PUBLIC PROSECUTOR

v.

LKI HOLIDAYS LEISURE SDN BHD

HIGH COURT MALAYA, ALOR SETAR
HISHAMUDIN YUNUS J
[CRIMINAL APPEAL NO: 41-201-95]
9 JUNE 1997

CRIMINAL PROCEDURE: *Charge - Framing of particulars - Lacking in material particulars - Whether ss. 152, 153 and 154 complied by prosecution - Wording of statute to state in charge - Defendant charged under s. 5(2) of Tourist Industry Act 1992 - Offence of carrying on a tour operating business without a valid licence - Whether essential for prosecution to state in charge the particular type of business allegedly carried out by defendant - Definition of "tour operating business" - Whether carried out business of arranging transportation of tourists or carried out business of arranging accommodation for tourists without a licence - Whether charge defective, vague and meaningless - Tourist Industry Act 1992, ss. 2, 5(2), 7(1) - Criminal Procedure Code, ss. 152, 153, 154 & 156*

The respondent, a company, was prosecuted at the Magistrate's Court for an offence under s. 5(2) of the Tourist Industry Act 1992. At the commencement of the trial, a preliminary objection was raised by the learned defence Counsel for the respondent who objected to the charge on the ground that it was lacking in material particulars. The learned Magistrate overruled the objection and proceeded with the trial. However, at the end of the prosecution case, the respondent was acquitted and discharged without his defence being called as the prosecution had failed to establish a case against the respondent. Hence, this appeal by the Public Prosecutor against the acquittal.

Held:

[1] Prosecuting Officers should take the task of drafting charges seriously and discard the attitude that drafting charges are mere mechanical tasks.

[2] The provisions of ss. 152, 153 and 154 of the Criminal Procedure Code should be strictly adhered to.

[3] The contention of the defence regarding the charge had merit. In view of the definition of "tour operating business" as set out in s. 2 of the Tourist Industry Act 1992, it was essential for the prosecution to state in the charge the particular type of business allegedly carried out by the respondent.

[4] The charge would be defective as well as vague and meaningless if its content was confined only to the wording of s. 5(2)(a) of the Tourism Industry Act 1992. Indeed, the fundamental principle is that the offence must be stated with sufficient precision to enable the accused to meet the charge.

[5] The defence contention that the charge was vague and bad in law was upheld. Indeed, the respondent had been highly prejudiced and embarrassed by such defect.

[6] The prosecution had not called any person to testify that, while being a tourist, he had engaged the respondent company for the purpose of obtaining such services as transportation, accommodation or conducted tours. The documentary evidence relied on by the prosecution to prove its case was not directly relevant to the charge which alleged that the offence took place on 22 August 1993.

[Appeal by prosecution against acquittal dismissed.]

Cases referred to:
Public Prosecutor v. Syed Bakri (unreported) ***(refd)***
Public Prosecutor v. G. Choudhury [1981] 1 MLJ 76 ***(refd)***
Lew Cheok Hin v. Public Prosecutor [1956] MLJ 133 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 152(3) 153, 154, 156
Tourism Industry Act 1992, ss. 2, 5(2)(a), (3)

For the appellant - Abdul Razak Musa, DPP
For the respondent - Gooi Hock Seng

JUDGMENT

Hishamudin Yunus J:

The respondent, a company, was prosecuted at the Magistrate's Court, Langkawi, for an offence under s. 5(2) of the Tourism Industry Act 1992 (Act 482) (hereinafter I shall refer to as 'the Act'). The charge states:

> Bahawa kamu pada 22 Ogos 1993 lebih kurang jam 12.05 tengahhari bertempat di no. 7, Jalan Pandak Mayah 4, Bandar Baru, Kuah, 07000 Langkawi, Kedah telah menjalankan perniagaan kendalian pelancongan tanpa mempunyai lesen yang dikeluarkan oleh Pesuruhjaya Pelancongan di bawah s. 7(1) Akta 482 – Akta Industri Pelancongan 1992 dan dengan itu telah melakukan kesalahan di bawah s. 5(2) Akta yang sama yang mana jika disabitkan boleh dihukum di bawah s. 5(3) Akta yang sama.

The respondent claimed trial.

At the commencement of the trial, the learned defence Counsel for the respondent, by way of preliminary objection, objected to the charge on the ground that it was lacking in material particulars. The learned trial magistrate overruled the objection and proceeded with the trial. However, at the end of the case for the prosecution, after hearing the submission of no case to answer by the defence Counsel and the submission in reply of the prosecuting officer, the magistrate acquitted the respondent on the grounds that the prosecution had failed to establish a case which requires the defence to rebut.

The Public Prosecutor now appeals against the decision of the Magistrate's Court.

In this appeal, the learned Counsel for the respondent, Encik Gooi Hock Seng, who was also the defence Counsel at the Court below, in reply to the submission of the learned DPP, raises the same point of law pertaining to the charge. The learned Counsel maintains that the charge is defective and bad in law. He contends that in view of the definition of the term "tour operating business" as in s. 2 of the Act, defining the meaning of that term, the charge should contain particulars specifying the manner in which the respondent allegedly had carried out the tour operating business.

Now, s. 5(2) reads:

> 5. **Tourism enterprises to be licensed.**
>
> (2) No person shall carry on or operate, or hold himself out as carrying on or operating –
>
> (a) a tour operating business; or
>
> (b) a travel agency business,
>
> unless it is a company and holds a valid licence granted under this part.

It will be noted that there is no reference in the charge either to limb (a) or to limb (b) of sub-s. (2). However, it is obvious that it is limb (a) that was being invoked by the prosecution because of the use of the words **"menjalankan perniagaan kendalian pelancongan"** ("carried on a tour operating business") in the charge.

What is a "tour operating business"? The meaning of this term is given by s. 2 of the Act as follows:

"tour operating business" means any business of providing all or any of the following services:

(a) arranging for sale or commission any transportation, accommodation, tour services or any other incidental services for tourists within or outside Malaysia;

(b) organizing or conducting for sale or commission inbound or outbound tours;

(c) providing conveyances for hire to tourists;

(d) any other services incidental to any of the services enumerated above.

Section 2 further defines the terms "inbound tours", "outbound tours" and "tourists".

From the above provisions, it will be appreciated that the Act assigns a certain – but a rather wide – meaning to the term "tour operating business". The term encompasses any of the services as enumerated in (a)-(d) above.

Now, coming to the evidence, I observe that the prosecution had not called any person to testify that, while being a tourist, he had engaged the respondent company for the purpose of obtaining such services as transportation, accommodation or conducted tours. Only four witnesses were called to testify for the prosecution. PW1 and PW2 were enforcement officers from the Malaysian Tourism Promotion Board. They had carried out the raid at the premises of the respondent. PW3, an Assistant Administrative Officer with the State Government of Penang, was the Investigating Officer. The last witness called, PW4, was an officer from a company operating a tourist business who testified that his company had received a quotation from the respondent.

It is clear that looking at the manner the case was presented, the prosecution, for the purpose of proving its case, was relying solely on the documents which were seized by the enforcement officers from the respondent's premises. The defence objects to the admissibility of these documents on the ground that the respective makers of the documents were not called.

Back to the point raised by learned Counsel, first, I wish to say this. Sitting as an appellate Judge, like I do now, quite often I do observe from the appeal record of the lower Court that charges are badly drafted. This observation has been bothering me for quite some time and I think I should take the opportunity here to comment that prosecuting officers should not take the task of drafting charges lightly. The attitude that drafting charges are mere mechanical tasks ought to be discarded. Prosecuting officers should take the task seriously. They should be meticulous and at the same time ensure that

the provisions of ss. 152, 153 and 154 of the Criminal Procedure Code ('CPC') are strictly adhered to. They should, from time to time, seek the advice of the Deputy Public Prosecutor, especially when it concerns the drafting of the less common offences (for instance like the one in the present case). Magistrates too are under a duty to ensure, at the commencement of any criminal case before them, that the charge has been properly drafted. Should it come to the notice of the presiding Magistrate that the charge is defective, he should promptly bring it to the attention of the prosecuting officer, and thereafter take the necessary measure to rectify the defect. Let me remind Magistrates and prosecuting officers of the advice of Mr. Justice Thomson (who later became our first Lord President) given more than forty years ago. In his oral judgment in *Public Prosecutor v. Syed Bakri* (Ipoh – Criminal Revision No. 3 of 1955 – unreported) his lordship said:

> I have repeatedly emphasised that in framing charges prosecution officers should adhere as closely as possible to the wording of the statute constituting the offence which is charged and that Magistrates should be at pains to see that this is done. If it is done, the prosecution know what they have to prove and the accused person knows what is charged against him. If it is not done, then there is the danger of a muddle of the sort that has come to light in this case.

In the present case, in my judgment, the contention of the learned defence Counsel regarding the charge has merit. In view of the definition of "tour operating business" as set out in s. 2 of the Act, it is, to my mind, essential for the prosecution to state in the charge the particular type of business allegedly carried out by the respondent. For example, if the prosecution is alleging that the respondent had carried out the business of arranging transportation for tourists, then this particular allegation must be specifically stated in the charge. Likewise, it must be stated in the charge if the prosecution is alleging that the respondent had carried out the business of arranging accommodation for tourists without a licence. And, taking the matter further, if the allegation is that the respondent had carried out the business of arranging transportation **and** accommodation for tourists, then the prosecution must prefer two separate charges: one for the business of arranging accomodation, and the other for the business of arranging transportation.

In this connection, I wish to remind the prosecution the provisions of s. 152 of the CPC, in particular, sub-s. (3) which stipulates:

> 152. **Form of charge.**
>
> (3) If the law which creates the offence does not give it any specific name so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

Reverting to s. 5(2)(a) of the Act, it will be observed that, unlike the provisions of the Penal Code, which gives specific names to the offences prescribed by the Code (like murder, theft, rape, etc.), this provision of the Act, which is the subject matter of the charge in the instant case, does not give the offence a specific name: it merely states the prohibited act or activity. It states, *inter alia,* that the carrying out of a tour operating business without a licence is prohibited (see limb (a) of sub-s. (2)). And sub-s. (3) of s. 5 provides the penalty or sanction for the breach of that prohibition. Now, this being the case, by virtue of the above sub-s. (3) of s. 152 of the CPC, it is imperative that "so much of the definition of the offence" must be stated in the charge. The purpose is to give the accused person adequate notice of the matter so that he afforded the opportunity to defend himself. Failure to state the definition (to the extent necessary so as to give adequate notice) would render the charge defective. It has been held that a defective charge is one that does not have sufficient particulars to give notice to the accused of the manner in which he is alleged to have committed the offence (*Public Prosecutor v. G. Choudhury* [1981] 1 MLJ 76).

In the context of s. 5(2)(a) of the Act, I cannot bring myself to accept that in order to satisfy the requirement of s. 152(3) of the CPC the prosecution needs only to repeat in the charge the wording as found in limb (a), that is to say, to incorporate merely the words "tour operating business" – as was done in the present case. In my judgment, what is required by s. 152(3) of the CPC to be stated in the charge, in particular, by the words "so much of the definition of the offence", is more than that: the charge must also incorporate the relevant part of the definition of "tour operating business" as set out in s. 2 of the Act; and which relevant part of the definition is to be incorporated in the charge would, of course, depend on the evidence that the prosecution intended to adduce. The charge would be defective as well as vague and meaningless if its content is confined only to the wordings of s. 5(2)(a). Indeed, the fundamental principle is that the offence must be stated with sufficient precision to enable the accused to meet the charge (*Lew Cheok Hin v. Public Prosecutor* [1956] MLJ 133).

In the present case, I do, therefore, accept the defence contention that the charge is vague and bad in law.

Of course, I am mindful of the provision of s. 156 of the CPC which provides:

> 156. **Effect of errors.**
>
> No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by such error or omission.

The rationale behind this provision is not difficult to ascertain: to minimise acquittals resulting from some technical defects in the charge. Now, in the instant case, was the respondent in fact misled by the omission to incorporate in the charge the relevant part of the definition of "tour operating business"? Since the defence was not called, in order to determine whether or not the respondent was in fact misled by the omission, my judgment would have to depend on the extent of the defect and also on the evidence of the prosecution. As I have said earlier, the prosecution was relying merely on documentary evidence. Various documents were tendered as evidence before the magistrate such as a voucher book, a receipt book, a log book, a rubber stamp bearing the chop "LKI HOLIDAY and LEISURE SDN BHD", letters stating quotations, etc. PW1 and PW2 also gave evidence regarding the display of a sign board at the premises of the respondent company stating "LKI HOLIDAY and LEISURE SDN BHD". Now, judging from the fact that the prosecution had relied merely on documentary evidence, and that the documentary evidence shows various transactions or activities, some dating back to 1992 (whereas the charge alleges that the offence took place on 22 August 1993) I have no difficulty in inferring that the respondent had in fact been misled by the omission in the charge. Indeed, the respondent had been highly prejudiced and embarrassed by such defect.

This appeal by the prosecution against the acquittal is, therefore, dismissed.

Reported by VT Singam